Date: **September 27, 1999**

Case No.: **1999-TLC-7**

ETA Case: **4026**

*In the Matter of*:

**SNEED FARM**
Respondent

BEFORE: John M. Vittone
Chief Administrative Law Judge

## DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2).

## Statement of the Case

Sneed Farm ("Respondent") filed its H-2A application with the U.S. Department of Labor, Employment and Training Administration on August 25, 1999. (AF 1-20). In this application, Respondent sought certification for one H-2A worker. (AF 3). Specifically, Respondent sought a "Farmworker, Diversified"[2] to assist in raising cattle and to assist in farming corn. (AF 4).

The Regional Administrator ("RA") reviewed this application and denied it on September 2, 1999. (AF 21). This denial was based on two reasons. First, the RA denied the application as untimely. The RA thus instructed Respondent to modify the certification application to conform with § 656.101(c)(1). Second, the RA denied the application for not being seasonal in nature. The RA stated that "[t]he care of livestock is considered to be of a continuous nature carried on throughout the year. While the degree of care may vary during the year, it nevertheless is a

[1]Unless otherwise noted, all regulations cited in this decision are in Title 20.

[2]Dictionary of Occupational Titles ("DOT") definition number 407.663.010.

continuous need." (AF 23). The RA informed Respondent that the application could be cured in this respect by deleting care of livestock from the duties to be performed. *Id.*

Respondent has requested an expedited review of its application pursuant to § 655.112(a). (AF 25-37). The parties were given until noon on September 25, 1999 to file any briefs or position papers and were informed that no additional evidence would be accepted with those briefs pursuant to the regulations. § 655.112(a)(2). Respondent's and the RA's brief were timely received on September 25, 1999.

## Discussion

First, I note that Respondent attached new evidence[3] to its request for expedited review. According to the regulations, new evidence may not be accepted by the administrative law judge when a request for expedited review has been filed. § 655.112(a)(1). As this evidence had not been provided to the RA prior to the denial, it cannot be reviewed now. Accordingly, this evidence is excluded from the record.

The only issue contested in this matter involves whether Respondent is offering a position that is "of a temporary or seasonal nature" pursuant to § 655.101(a).[4] "Seasonal nature" is defined as "'on a seasonal or other temporary basis', as defined in the ...regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)." § 655.100(c)(2)(i). This regulation provides:

> Labor is performed on a seasonal basis, where, ordinarily the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
>
> A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

29 C.F.R. § 500.20.

Further, the regulations governing H-2A regulations indicate that temporary, as used above, "refers to any job opportunity covered by this subpart where the employer needs a worker for a

---

[3]The new evidence consisted of a letter from Mr. Steve Richardson, the county agent for the area including Respondent and a member of the Cooperative Extension Service of Mississippi State University.

[4]Respondent, in its request for expedited review, acknowledged that the RA was correct as to the timeliness of the application, and has corrected the starting date to correct this deficiency.

position, either temporary or permanent, for a limited period of time, which shall be for less than one year[.]" § 655.100(c)(2)(iii).

Respondent does not dispute that "in all instances livestock need basic and continuous care." (AF 26). However, Respondent argues that despite this fact, it does experience a reduced need for labor during the summer, as cows give less milk during the summer due to the heat and due to the fact that the "birthing seasons" are over. (AF 25). That is why Respondent only applied for a period of time ending on July 1, 2000. (AF 4). Respondent argues that such a need is the specific type described in § 655.100(c)(2)(iii).

The RA states that the definition of "temporary or seasonal" precludes such a construction as it refers to employment that is "exclusively performed at certain seasons or periods of the year[.]" § 655.100(c)(2). The RA argues that any other interpretation "would swallow-up the definition of seasonal and render the entire discussion of seasonality nugatory." The RA opines that "temporary," as used in these regulations should thus be seen only as "contemplating the 'one time occurrence' situation described in 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

According to the regulatory and rule-making history, an employer seeking the benefits of H-2 visas for non-immigrant aliens must establish that it has a temporary need for these workers, not that the job is temporary. *See* 52 Fed. Reg. 16,770 (1987) (proposed May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule June 1, 1987); 52 Fed. Reg. 20, 507 (1987) (codified at 20 C.F.R. pt. 655). *See also W.A. Malrstberger*, 1998-TLC-6 (Feb.20, 199). Specifically, the rulemaking demonstrates that the Department of Labor accepted the interpretation as held in *Matter of Artee Corporation*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982), which held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is "whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling." *Id.*; 52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987).

The definitions listed above and the rule-making history have led to prior precedent detailing the way in which an employer may establish that the employment offered is temporary or seasonal in nature. Specifically, it has been held that:

> [A] temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer's need to have the job duties performed is "temporary" – of a set duration and not anticipated to be recurring in nature; or (2) that the employment is **seasonal** in nature that is, employment which ordinarily pertains to or is of the kind exclusively performed at certain **seasons** or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. *See* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20).

*Kentucky Tennessee Growers Assoc., Inc.*, 1998-TLC-1 and 2 (Dec. 16, 1997) (emphasis in original).

In the present scenario, Respondent's need is of a set duration. Despite this fact, it is expected to recur next year. Accordingly, this employment is not temporary. Respondent may thus only prevail by proving, by a legal sufficiency, that the employment is seasonal.

In her brief, the RA chooses to place emphasis upon the word "exclusively" in the definition of seasonal employment. The full definition, however, is modified by the word "ordinarily." As such, the definition as listed in the regulations is the most common, most general, most normal version of what would be considered seasonal employment. It is not the only definition.

In the *Matter of Artee Corporation*, 18 I. & N. Dec. 333 (1982), the Board of Immigration Appeals held that the true test of the temporary nature of a job is the employer's need, not the duties of the job. Under the circumstances of this case, it is necessary to extend this logic to the seasonal portion of the definition. In essence, it is appropriate in this matter to determine if the employer's needs are seasonal, not whether the duties are seasonal.

Respondent has stated, without challenge from the RA, that it has two "birthing seasons" during the year, and that the milk production is greater during this time, *i.e.*, from October to July. Respondent thus seeks one temporary employee to help manage the duties of the farm during this time. It is true that the duties of this employee are of the type that may be performed year round, depending on the employer. When focusing on the Respondent's needs, it is clear that the employer only needs seasonal help, as Respondent only breeds the cows periodically and thus only has the increased volume periodically, or seasonally. During the other three to four months of the year, the business of the farm is such a pace so that Respondent is run solely by its owner and family. During this period, or season, no other help is needed. Accordingly, due to the nature of Respondent's needs, the employment is periodical, or seasonal, in nature.[5]

[5]Such a result is supported by the fact that Respondent, under the present evidence, would be unable to obtain permanent labor certification, as, by its nature and the needs of the employer, the job would not be permanent in nature. *See Vito Volpe Landscaping,* 1991-INA-300, *et al.* (Sep. 29, 1994) (*en banc*). The strict interpretation proffered by the RA could thus lead to an untenable position where an employer would not be qualified to hire an alien for permanent employment, could not afford to to pay a U.S. or alien worker to work year round, would not be qualified to hire an alien to preform temporary work, and would not be able to find a U.S. worker willing to take a part-time position, thus forcing an employer out of business.

## ORDER

The Regional Administrators' denial of temporary alien agricultural labor certifications is hereby **REVERSED**.

at Washington, DC

**JOHN M. VITTONE**
***Chief Administrative Law Judge***

JMV/jcg